RECORD AND BRIEFS

No. 16-341

IN THE

Supreme Court of the United States

TC HEARTLAND LLC,

Petitioner,

v.

KRAFT FOODS GROUP BRANDS LLC,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICUS CURIAE* UNIFIED PATENTS INC. IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Unified Patents Inc. is a member organization dedicated to deterring non-practicing entities, or NPEs,[2] from using extortionate litigation tactics to extract settlements from operating companies based on patents that might well be found invalid before the district courts and unpatentable before the patent office, but for the expense of defending against them.

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1. This brief is filed with the written consent of all parties. No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus curiae, its members, or its counsel made a monetary contribution intended to fund its preparation or submission.

2. We recognize and define NPEs as follows:

Non-Practicing Entity (NPE) = Company which derives the majority of its total revenue from Patent Licensing activities.

NPE (Patent Assertion Entities) = Entity whose primary activity is licensing patents and acquired most of its patents from another entity

> An NPE may also derive most of its total revenue from Product Sales or Services, or may be an entity whose original activity was providing products and services, but now is primarily focused on monetizing its own patent portfolio, or may be an entity owned or controlled by an individual inventor who is primarily focused on monetizing inventions patents by that individual inventor.
>
> In contrast to an NPE, an operating company is one which derives most of its total revenue from Product Sales or Services.

Unified serves more than 150 members, from small technology start-ups to automobile manufacturers, cable companies, banks, and other Fortune 500 companies, as well as industry groups and others dedicated to reducing the unnecessary drain on the US economy of the now-prolific baseless litigation over infringement of broad patents of dubious validity. Unified challenges patents using publicly available means, fights NPEs before the Patent Trial and Appeal Board, and helps to reduce the costs companies incur fighting off baseless litigation. In so doing, Unified encourages operating companies to invest in commercializing technology, and thus advances public policies that foster competition and innovation. Addressing the strategic use of venue, a form of "forum shopping" in which venue is selected per the monetary goals of a particular patent litigation rather than in the interests of justice and thus stifles innovation, is central to Unified's mission.

INTRODUCTION

Patent litigation today is dominated by plaintiffs' forum shopping—a widely used tactic that springs directly from the Federal Circuit's misinterpretation of the patent venue statute. This *amicus curiae* brief seeks to explain those inequities and their effects on technological innovation, business, and fairness.

The Federal Circuit's broad interpretation of venue for patent cases is contrary to the venue laws for any other form of litigation, in any other Circuit, and is contrary to the interpretation of this Court. It is unsupported

by the plain language of the statute,[3] and frustrates the recently passed America Invents Act (AIA). Congress intended that the AIA would assist American industry in dealing with an ever-increasing number of lopsided, costly, and often questionable patent lawsuits in which low-quality patents were asserted in far-flung judicial districts. As part of the AIA, Congress introduced, among other things, *inter partes* reviews (IPRs), which allow any interested party to avail itself of the expertise of the United States Patent & Trademark Office (PTO) to consider patentability efficiently, by an administrative Board convened within the PTO itself, based on evidence and arguments not previously considered.[4] By helping ferret out unpatentable claims that likely never should have issued or which intervening Supreme Court cases have thrown into question, this Patent Trial and Appeal Board (PTAB) has helped to deter some frivolous and exploitative patent litigation. Yet NPEs still litigate early and often in the district court system, particularly in the Eastern District of Texas, and exploit venue via an extreme type of forum shopping. Thus, Congress's goal remains largely unrealized, and the problem of lopsided, costly, and often questionable patent lawsuits persists.

Lax patent venue rules persist. Nationwide venue has allowed NPEs to compensate, in general terms, for some of the leverage they lost with the establishment of the PTAB. Venue was addressed in the AIA, though tangentially, through restrictions on joinder, but nothing today prevents NPE plaintiffs from using dozens of cheap-to-file, expensive-to-litigate complaints to extract nuisance settlements in any district in the country,

3. Pub. L . No. 112-29, 125 Stat. 284 (2011).

4. 35 U.S.C. §§ 312–16; § 325(d).

regardless of where the accused infringers do business. The AIA—and broad court decisions below—allow NPEs to strategically select specific district courts they think will best achieve their objectives.

As a result of the Federal Circuit's interpretation of venue, modern patent practice has evolved so that the vast majority patent disputes are settled in one of two venues: the District Court for the Eastern District of Texas (EDTX), and the District Court for the District of Delaware (DDE). The remaining 92 district courts are virtually irrelevant to patent law today. Indeed, one judge and magistrate in the Eastern District of Texas preside over thousands of patent cases annually: two judges control more than a third of the nation's patent docket.[5] This extreme concentration of cases is inexplicable within a fair legal system, and appears unique in the history of the Federal District Courts.

This narrowing of the arena for patent litigation—largely due to the Federal Circuit's rejection of this Court's ruling in *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222 (1957)—awards an unprecedented litigation advantage to plaintiff-NPEs. Because the EDTX and DDE are demonstrably cheaper, easier, and quicker to work within than the other 92 districts,[6] yet remain lopsidedly

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5. *See* Jonathan Stroud, NFC Tech. v. HTC Am.: *Judge Bryson's Sitting-by-Designation Guide to Securing Stays in Light of Inter Partes Reviews*, 65 Am. U. Law Rev. 1075, at 1078 (2016) (finding the "U.S. District Court for the Eastern District of Texas" was "home to forty-four percent of all patent litigation in the United States," referencing the Unified Patents 2015 Annual Report) (footnote and citation omitted).

6. Possibly at least partially due to "forum selling," *see, e.g.*,

expensive for the defense of alleged infringement, when deciding where to litigate NPEs need only choose between these two courts according to their strategic needs. This is neither what Congress nor this Court intended, and this patent exceptionalism merits emendation.

SUMMARY OF THE ARGUMENT

By rejecting *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222 (1957), as well as the plain meaning of 28 U.S.C. § 1400(b), the Federal Circuit has allowed patent plaintiffs to file suit against defendants wherever personal jurisdiction can be established. To wit, patent plaintiffs can select a jurisdiction for suit based upon strategies divorced from the case itself. For example, a plaintiff more interested in negotiating a settlement can sue in a jurisdiction they perceive to be more likely to grant discovery, deny summary judgment motions, and have a jury trial, while a plaintiff more interested in litigating can file where a court asks for damages contentions, takes early claim construction, and controls and limits the cost of discovery.

Jurisdictions differ in substantive ways—particularly for patent litigation—including their speed of adjudication, local procedural patent rules, speed and method of disposition, willingness to transfer, likelihood of granting jury trials, and, at least as perceived, in their biases towards certain types of parties—plaintiffs vs. defendants, foreign vs. domestic, etc. These differences are reflected in win rates for different types of plaintiffs, damages awards, settlement rates and speed to settlement, and in how cases are won or lost.

Matthew Sag, *IP Litigation in U.S. District Courts: 1994-2014*, 101 Iowa L. Rev. 1065 (2016)

Given the same law and facts, legal outcomes should be the same in any jurisdiction. When this precept is defied, the result is not only inefficiency—with forum-shopping causing excessive costs for both plaintiffs and defendants—but also can lead to a lack of respect for the law. As has been noted, "unpredictability and inconsistency in the application of the law among the district courts.... erodes public confidence in the law and its enforcement and creates doubt about the fairness of the system."[7] Unpredictability also reduces the value of valid patents and results in a diversion of resources from innovation to enforcement.[8] Frustratingly, even in the face of the AIA, the costs of the patent litigation system have appeared relatively static, suggesting that it has taken on a self-sustaining life of its own.[9]

Worse, under the current patent venue regime, outcomes in some types of patent cases are predictable, because certain jurisdictions act procedurally in ways that specifically bias litigation cost and case outcomes toward certain plaintiffs. Patent litigation is not now a question of law and facts, but neither is it a roll of the dice: litigators can pick their jurisdiction strategically to improve their chance of success. Such success can mean dozens of quick settlements for hundreds of thousands or even millions of dollars, with certain defendants who can afford to fight earning walk-away settlements, and others forced to pay

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7. Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation*, 79 N.C. L. Rev. 889, 924 (2001).

8. *Id.* at 928ff.

9. *See, e.g.*, Mark A. Lemley, *The Surprising Resilience of the Patent System*, 95 Texas L. Rev. 1 (2016).

the piper a settlement calculated as less than the cost of getting to a question of validity on summary judgment.

The current patent venue regime is demonstrably and quantifiably imbalanced, parties have used this imbalance to secure individual leverage, and public perception of the fairness of the courts has been damaged. The regime must be changed. This Court should reaffirm their ruling in *Fourco* to restore public confidence and economic efficiency in the adjudication of the only legal monopolies our system tolerates.

ARGUMENT

Jurisdictions Differ in Substantive Ways Relevant to Patent Litigation that Can Bias Proceedings Against a Patent Defendant.

Jurisdictions differ in substantive ways relevant to patent litigation, and certain jurisdictions act in ways that specifically bias case costs and case outcomes toward certain plaintiffs. For example, local rules and practice in the Eastern District of Texas dictate a very quick and expensive discovery and trial schedule—relative to that of other courts— thus benefiting plaintiffs who can prepare their case before filing. Matthew Sag, *IP Litigation in U.S. District Courts: 1994–2014*, 101 Iowa L. Rev. 1065, at 1136 (2016). The Eastern District also effectively discriminates against defendants with its self-proclaimed stance against summary judgment motions, based on its attitude that "[p]arties now routinely file summary judgment motions on nearly every major trial issue, regardless of whether the documentary evidence warrants summary judgment." *Order Regarding Letter*

Briefs, Summary Judgment Motions, Motions to Strike Expert Testimony/Daubert Testimony/Daubert Motions (E.D. Tex. Jun. 17, 2016). This attitude itself pre-judges whatever evidence defendants may have that plaintiffs have filed a frivolous or meritless suit that might be easily disposed of.

Further, the method by which judges are assigned to cases in the Eastern District of Texas, in which random assignment is biased by a pre-determined percentage for each type of case, combined with the fact that the district fields only fifteen judges in six divisions, means that a crafty plaintiff practically select the judge to which their case is assigned by filing in a selected division. *See* J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. Pa. L. Rev. 631, 671 (2015). And the particular judge assigned to a case can make a big difference: while the overall percentage of favorable decisions for NPE patent holders in 2016 was 33%, in the period 1995–2016 the success rate in the courtroom of one Eastern District of Texas judge was 2.2 times this average, and in another, 1.7 times.[10]

Local practices and rules in different jurisdictions can produce a favorable environment for patent plaintiffs in terms of bias against defendants in, e.g., speed of litigation, summary judgments, and judge selection, so that one would expect win rates for plaintiffs to be higher in some jurisdictions than others. But "win" is a complete measure of success only in each trial. Overall, in this district verdicts were found for patent plaintiffs in 52%

10. PricewaterhouseCoopers LLP, *2016 Patent Litigation Study*, at 17, May, 2016.

of 19 trials.[11] Patent verdicts in the Eastern District of Texas have had almost a 50% chance of being overturned on appeal. Brian J. Love and James Yoon, *Predictably Expensive: A Critical Look at Patent Litigation in the Eastern District of Texas*, 20 Stan. Tech. L. Rev. 1, 20 (2017). Tellingly, more than eighty-one per cent of the patent cases settled in less than a year, compared to a national settlement average (excluding the Eastern District) of 63.1%. *Id.* at 14. These rapid settlements reflect both the pressures on defendants exerted by that court's practices and the lack of intention of many of the litigants to litigate, rather than simply extract nuisance settlements.

Because of Jurisdictional Differences and Loose Venue Rules, Patent Plaintiffs Select a Jurisdiction for Suit Based Upon Extra-Legal Strategies.

Selection of a particular court or judge can give a plaintiff advantages in a patent case not based on either the law or the facts, so that there is an incentive for plaintiffs to institute suit in a court identifiable as most advantageous. Because of the characteristics of the Eastern District of Texas, as stated above, the vast majority of patent cases brought by NPE plaintiffs are brought there.

The outsized presence of the Eastern District in the world of patent litigation—and the role of NPEs in that world—is demonstrated by recent data on patent

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11. http://mcsmith.blogs.com/eastern_district_of_texas/2016/12/2016-edtx-patent-verdicts-review-43-marshalltyler-win-rate-52-overall-competitor-cases-increase.html.

lawsuits.[12] In data Unified has compiled, in 2015, a total of 5,911 patent lawsuits were filed in all districts of the United States. Of those lawsuits, 2,561, or 43%, were filed in the Eastern District of Texas.

This figure should be understood in terms of who filed those lawsuits. Of the 5,911 lawsuits filed in the entire country, about 65% were filed by NPEs. And of the 65% of all patent lawsuits filed by NPEs, 62% were filed in the Eastern District of Texas. Of the remaining 35% of the patent lawsuits filed by operating companies, only *seven* percent were filed in the Eastern District of Texas.

Thus, NPEs were almost *nine times* more likely to file a patent lawsuit in the Eastern District of Texas than in any of the other 93 districts. While there are multiple ways to measure activity, all data sources we are aware of, regardless of source, demonstrate an extreme imbalance between the Eastern District of Texas. Clearly, NPE plaintiffs see an advantage in filing their patent lawsuits in the Eastern District of Texas, and freely do so, voting with their feet. Indeed, one academic study concluded that only 14% of the patent lawsuits filed in 2015 were filed where defendants were incorporated or have established places of business—i.e., as specified in the statute in question.[13]

The Federal Trade Commission (FTC) has weighed in as well. Subdividing the NPEs by type, into "portfolio PAEs" and "Litigation PAEs" yields further insight.

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12. Data provided by Robert Jain, Unified Patents Inc.; *see also UnifiedPatents.com*.

13. Colleen V. Chien & Michael Risch, *Recalibrating Patent Venue*, Santa Clara Univ. Legal Studies Research Paper No. 10-1 (Sept. 1, 2016), Table 3, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2834130.

Portfolio PAEs are defined as NPEs that negotiate licenses covering large portfolios, often containing hundreds or thousands of patents, frequently without first suing the alleged infringer; litigation PAEs are defined as NPEs that sue potential licensees and settle shortly afterward by entering into license agreements with defendants covering small portfolios or single patents.[14] By such subdivision, it can be seen that even within the NPE ecosystem, venue rules are manipulated.

The FTC study found that, when portfolio PAEs litigated their patents, they proceeded differently than did litigation PAEs. Portfolio PAEs tended to litigate only when their alleged infringers were reluctant to settle and, presumably, an impasse had been reached, but litigation PAEs tended to litigate first, primarily as a lever to induce settlement. The FTC found that litigation PAE cases tended to terminate much more quickly than Portfolio PAE cases—and litigation NPEs tended to settle for much less.[15] Indeed, while litigation PAEs settled 66% of their cases within 12 months, portfolio PAEs settled only 26% of their cases within the same period.[16] Although their desired goal is the same—a negotiated license—portfolio PAEs seem to wield litigation as a last-resort cudgel related to the value of their assets, rather than as bare leverage value, to reach this goal. In a sense, portfolio PAEs are the real litigators, and litigation PAEs would

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14. Federal Trade Commission, *Patent Assertion Entity Activity: An FTC Study*, Oct. 2016, *available at* https://www.ftc.gov/reports/patent-assertion-entity-activity-ftc-study. We note the FTC uses the phrase Patent Assertion Entity (PAE) in lieu of Non-Practicing Entity (NPE).

15. FTC, *id.* at 72.

16. *Id.* at 73.

rather not go to trial, thus gaming the imbalance to reap financial gains unrelated to the value of their patent. This difference in approach may be reflected in the choices of venues made by litigation and portfolio PAEs: portfolio PAEs, who would rather negotiate seriously than file wide-ranging litigations against dozens of defendants, tended to sue in the district of Delaware (44% of their cases), while litigation PAEs, who rationally would be expected to sue where they have the highest chance of quick settlement or costly trial, tended to sue in the Eastern District of Texas (54% of their cases).[17] It is possible that portfolio PAEs choose to sue in Delaware because that state's corporate laws are more favorable to the formation of the licensing contracts they want.[18]

The Success of Forum Shopping Leads to Questions About the Fairness of the Courts.

The abuse of the venue requirements in patent law has also caught the public's attention and led to questions about the fairness of the courts in general. For example, the *New York Times* recently published another article about Marshall, Texas, called *So Small a Town, So Many Patent Suits.*[19] The *Times* observed that

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17. *Id.* at 81.

18. This issue is complicated by this Court's decision in *Alice Corp. v. CLS Bank International*, 134 S. Ct. 2347 (2014), and the Delaware Court's apparent willingness to invalidate patents under *Alice* grounds. *See Delaware Patent Suits Dwindle As Plaintiffs Flock To EDTX*, Law360, February 10, 2016, https://www.law360.com/articles/756753/delaware-patent-suits-dwindle-as-plaintiffs-flock-to-edtx

19. *New York Times*, Sept. 24, 2006, http://www.nytimes.com/2006/09/24/business/24ward.html

> SPEED is not the only feature bringing patent holders to Marshall. So, too, is the fact that they usually win. Three-fourths of the cases that come to trial in Marshall are decided in favor of the plaintiffs, compared with less than half in New York.
>
> Others point to a different reason why plaintiffs may win more often than defendants: plaintiffs, they say, typically hire local Marshall lawyers. Hiring local in Marshall means that you will get a lawyer who not only knows the jurors, but who also probably knows their friends and even personal details like how often they go to church, local lawyers say.

The BBC News similarly observed that

> the speedy system (and speedy is relative) for dealing with patent cases . . . has made this small town's court famous or feared, depending on whether you're a plaintiff or a defendant.[20]

Similarly, the PBS NewsHour stated that:

They try cases quicker [in Marshall] than other places, and that's because of a few administrative rules that they put in place. And they rule in favor of NPEs more than anywhere else.[21]

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20. *The sleepy town kept busy with $2m-a-day patent cases*, BBC News, Aug. 20 2013 http://www.bbc.com/news/technology-23753311

21. *U.S. innovators dogged by money-grubbing 'patent trolls'* PBS NewsHour, May 26, 2016 at 6:25 PM EST http://www.pbs.org/

These are not isolated examples, nor are they untainted by intimations of favoritism.[22] Indeed, it appears that the Eastern District of Texas is slowly entering the public's imagination as an anomaly of imbalance. The health of the legal system is dependent upon public faith in its fairness, and abuse of the venue statute in patent cases attenuates that faith. For that important reason of public policy alone, this Court should decide that 28 U.S.C. § 1400(b) is the sole and exclusive provision governing venue in patent infringement actions.

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newshour/bb/u-s-innovators-dogged-by-money-grubbing-patent-trolls/

22. *Buying TiVo's bull in E.D. Texas,* The Prior Art, June 25, 2009 (TiVo purchased the Grand Champion Steer at Farm City Week in Marshall, Texas; the following week it won a large infringement verdict), available at http://thepriorart.typepad.com/the_prior_art/2009/06/buying-tivos-bull-in-ed-tex.html; *How A Texas Dog Park Became A New Front In America's Patent Wars*, Giaom, Oct 14, 2011 (California plaintiff's lawyer opened dog park in Longview, Texas), *available at* https://gigaom.com/2011/10/14/419-how-a-texas-dog-park-became-a-new-front-in-americas-patent-wars/

CONCLUSION

For the reasons given above, *amicus* respectfully submits that this Court should reaffirm its decision in *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222 (1957), *viz.*, that 28 U.S.C. § 1400(b) is the sole and exclusive provision governing venue in patent infringement actions and is not to be supplemented by 28 U.S.C. § 1391(c). The underlying Decision should be reversed.

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